

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Plaintiff,

v.

Case No.

Honorable Sean F. Cox

Defendant.

_____ /

**NOTICE AND ORDER SETTING
SCHEDULING CONFERENCE IN PATENT INFRINGEMENT CASE**

Counsel are hereby notified to appear on _____ at _____ in the Chambers of
Judge Sean F. Cox, Room 257, Theodore Levin U.S. Courthouse, 231 West Lafayette, Detroit,
Michigan for a Scheduling Conference in the above-referenced action.

The Court further **ORDERS** as follows:

- **MODEL RULE 26(F) REPORT AND SCHEDULING ORDER:** In order to efficiently manage patent infringement action, this Court has adopted a Model Rule 26(f) Report and Proposed Scheduling Order, a copy of which is attached to this Notice and Order. The Court intends that the model scheduling order guide the parties in the types of provisions and the timeline that the parties propose to the Court at the Scheduling Conference. The Court typically schedules patent infringement cases for trial approximately 18 months after the Scheduling Conference. The parties may propose modifications and additional provisions to the model scheduling order and/or may propose an alternative timeline, as needed based upon the facts and circumstances of the particular case.
- **USE OF A SPECIAL MASTER:** At the Scheduling Conference, the parties should be prepared to discuss the potential use of a special master in this case.

- SETTLEMENT: At the Scheduling Conference, the parties should be prepared to discuss the likelihood of settlement. Before attending the Scheduling Conference, the attorneys should discuss settlement options and mediation/facilitation with their clients. Clients are not required to attend the Scheduling Conference.
- INFORMAL TECHNOLOGY TUTORIAL: Before any claim construction briefs are submitted, the Court typically schedules an informal tutorial on the technology involved in the case. The purpose of the informal tutorial is to give the Court an understanding and background of the technology at issue in the case. The tutorial is not on the record.
- LENGTH OF CLAIM CONSTRUCTION BRIEFS: Each party's opening claim construction brief shall not exceed 20 pages (i.e., plaintiff's opening claim construction brief and defendant's response brief). The plaintiff's reply brief shall not exceed 5 pages. If the parties believe that they need an extension of the page limitations, they must file a written motion setting forth the reasons for the extension.
- CLAIM CONSTRUCTION HEARING: The Court typically does not hear live testimony at the claim construction hearing. However, on a case-by-case basis, the Court may allow expert testimony from a person of ordinary skill in the art. If the Court allows expert testimony, each side is typically limited to one hour of live testimony. A request for live testimony must be made by written motion.
- DEFAULT PROTECTIVE ORDER: The Court recognizes that during discovery the parties will likely need to disclose confidential and/or proprietary business information (e.g., trade secrets, financial information, etc.) that is not publicly available. In order to protect the parties' confidential and proprietary information, the Court will automatically enter a default protective order. The purpose of the default protective order is to allow the parties to begin discovery as soon as possible and to minimize the time and expense to the parties. The parties may propose modifications to the Court's default protective order, or agree to an entirely new protective order, but discovery should commence to the extent possible under the default protective order until a new or modified protective order has been entered.

IT IS SO ORDERED.

S/Sean F. Cox

Sean F. Cox

United States District Judge

Dated: October 20, 2010

I hereby certify that a copy of the foregoing document was served upon counsel of record on October 20, 2010, by electronic and/or ordinary mail.

S/Jennifer Hernandez
Case Manager

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

PARTY 123,

Plaintiff,

vs.

PARTY XYZ,

Defendant.

Case No.: _____

Honorable Sean F. Cox

Magistrate Judge _____

Attorney
FIRM
ADDRESS
ADDRESS
TELEPHONE NUMBER

Attorneys for Plaintiff

Attorney
FIRM
ADDRESS
ADDRESS
TELEPHONE NUMBER

Attorneys for Defendant

MODEL RULE 26(F) REPORT AND PROPOSED SCHEDULING ORDER

Pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, the parties to this case, by and through their respective counsel, shall jointly submit this Rule 26(f) Report and Proposed Scheduling Order:

I. RULE 26(f) CONFERENCE.

Pursuant to Rule 26(f), the parties held a meeting on _____, which was attended by the following attorneys:

Attorney
FIRM
ADDRESS
ADDRESS
TELEPHONE NUMBER

Attorney for Plaintiff

Attorney
FIRM
ADDRESS
ADDRESS
TELEPHONE NUMBER

Attorney for Defendant

II. SUBJECTS AND NATURE OF DISCOVERY

A. DISCOVERY BY PLAINTIFF

[Plaintiff to list topics on which it wants discovery: For example, “Plaintiff will need to conduct discovery on the issues of patent infringement, damages, and any defenses raised by Defendant.”]

B. DISCOVERY BY DEFENDANT

[Defendant to list topics on which it wants discovery: For example, “Defendant will need to conduct discovery on infringement, validity, damages, and other defenses.”]

C. ELECTRONICALLY STORED INFORMATION

[Parties to specify the scope and any limits concerning discovery of ESI, the format for any production of ESI, and actions to be taken to preserve ESI, etc. *See* Fed. R. Civ. P. 26(f)(3) and 26(b)(2)(B).]

III. DISCOVERY SCHEDULE

A. FACT DISCOVERY

Fact discovery shall commence on _____ and be served no later than [Approximately 6-8 Months for Fact Discovery]. Discovery shall begin on all discoverable issues and shall not be limited to claim interpretation. Discovery shall include any relevant opinions of counsel if Defendant intends to rely upon an opinion of counsel as a defense to a claim of willful infringement.

B. RULE 26(a)(1) INITIAL DISCLOSURES

The parties will exchange the initial discovery disclosures required by Rule 26(a)(1) by [w/in 14 days of Rule 26(f) Conference].

C. DEADLINE TO ADD PARTIES

The deadline for adding parties is _____.

D. DISCLOSURE INFRINGEMENT CONTENTIONS

The patentee must serve disclosures of the following information by [w/in 14 days from date of scheduling order] _____:

1. Each patent claim that is allegedly infringed by each opposing party;
2. For each asserted claim, the accused product of each opposing party of which the patentee is aware. This identification shall be as specific as possible. Plaintiff shall identify each accused product by name or model number, if known.
3. A chart identifying specifically where each limitation of each asserted patent claim is found within each accused product, including for

each limitation that such party contends is governed by 35 U.S.C. § 112 ¶ 6, the identity of the structure(s), act(s), or material(s) in the accused product that performs the claimed function.

4. Whether each claim limitation of each asserted claim is claimed to be literally present or present under the doctrine of equivalents in the accused product.

E. DISCLOSURE OF INVALIDITY CONTENTIONS

Any party asserting invalidity or unenforceability claims/defenses must serve disclosures containing the following by [w/in 1 month of infringement contentions]:

1. Each item of prior art that allegedly anticipates each asserted claim or renders it obvious. For prior art that is a document, a copy of the document should be provided to the patentee's counsel or be identified by Bates Number if it was previously produced. As to prior art that is not documentary in nature, such prior art shall be identified with particularity (by "who, what, when, and where" etc.) as to publication date, sale date, use date, source, ownership, inventorship, conception and any other pertinent information.

2. Whether each item of prior art anticipates each asserted claim or renders it obvious. If a combination of items or prior art makes a claim obvious, each such combination, and the reason why a person of ordinary skill in the art would combine such items must be identified.

3. A chart identifying where specifically in each alleged item of prior art each limitation of each asserted claim is found, including for each claim limitation that such party is governed by 35 U.S.C. § 112 ¶ 6, the identity of the structure(s), act(s), or material(s) in each item of prior art that performs the claimed function; and

4. For any grounds of invalidity based on 35 U.S.C. § 112 or other defenses, the party asserting the claim or defense shall provide its reasons and evidence why the claims are invalid or the patent unenforceable. Such positions shall be made in good faith and not simply *pro forma* arguments.

F. NON-INFRINGEMENT CONTENTIONS

On or before [w/in 1 month of plaintiff's infringement contentions] , Defendant shall serve non-infringement contentions, which shall explain the factual basis for its allegations that it does not infringe the patent-in-suit either literally or under the doctrine of equivalents, including identifying what claim limitations that it believes are not present in the accused products.

STATUS CONFERENCE: The Court shall hold a Status Conference on _____[to be set by the Court].

G. CLAIM CONSTRUCTION PROCEEDINGS

Pursuant to the decision of *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384 (1996), the following procedures will be followed for resolution of claim construction issues in this case.

1. INITIAL IDENTIFICATION OF DISPUTED CLAIM TERMS –

The parties will confer to determine what claim terms may need to be interpreted by the Court by [w/in 1 month of INVALIDITY AND NON-INFRINGEMENT CONTENTIONS].

2. PROPOSED INTERPRETATIONS – On or before [w/in 1 month of INITIAL IDENTIFICATION OF DISPUTED CLAIM TERMS], the

parties shall exchange, but not file, a chart or table that lists for each disputed claim term the party's proposed interpretation of the disputed claim term along with citations to the intrinsic and extrinsic evidence (e.g., patent, prosecution history, dictionary definitions, etc.) that supports its interpretation along with a summary of any testimony that is expected to be offered to support that interpretation.

3. FINAL IDENTIFICATION OF DISPUTED CLAIM TERMS –

Within one week after exchanging the claim chart above, the parties shall confer again about the claim terms in dispute. At this meeting, the parties shall attempt to narrow and finalize the claim terms that need to be interpreted by the Court. If, at any time, the parties determine that a claim

construction hearing is not necessary, they shall notify the Court in a timely matter. The parties shall set forth separately the construction of those claim terms on which the parties agree.

4. TECHNOLOGY TUTORIAL – The Court will hold an informal conference with the attorneys on [w/in 1 week of the FINAL IDENTIFICATION OF DISPUTED CLAIM TERMS] at _____ a.m. / p.m. At the conference, the attorneys for each side will explain the technology at issue in the litigation. The conference will not be recorded.

5. PLAINTIFF’S OPENING CLAIM CONSTRUCTION BRIEF – Plaintiff(s) shall file its opening claim construction brief on or before [w/in 1 month from date of exchange of proposed claim interpretations].

6. DEFENDANT’S RESPONSE BRIEF – Defendant(s) shall file any responsive claim construction brief on or before [w/in 1 month from date of plaintiff’s opening brief].

7. DRAFT OF PLAINTIFF’S REPLY BRIEF – To the extent that Plaintiff intends to file a reply brief on claim construction issues, Plaintiff(s) shall serve, but not file, a good-faith draft of its intended reply brief on opposing counsel [w/in 14 days of the Defendant’s response brief]. Plaintiff shall prepare and serve within this time period a draft four-column claim interpretation chart in the form of Exhibit A.

8. IN-PERSON MEETING AT THE COURTHOUSE – Within [two weeks] from service of the DRAFT OF PLAINTIFF’S REPLY BRIEF, or the time that service would have been due if Plaintiff does not file a reply brief, principal counsel for both parties shall have a face-to-face meeting at the courthouse to discuss the parties’ legal theories and proposed claim interpretations in an effort to narrow the disputes and arguments that the Court must resolve. The courthouse has attorney conference rooms available for the meeting.

9. FILING OF FINAL VERSION OF REPLY BRIEF AND CLAIM CHART – Within [one week] of the IN-PERSON MEETING AT THE COURTHOUSE, Plaintiff shall file with the Court and serve on opposing counsel the final versions of its reply brief and the claim chart in the form of Exhibit A. Plaintiff shall set forth in its reply brief any previous claim interpretation disputes that the parties have resolved in the IN-PERSON MEETING AT THE COURTHOUSE. Plaintiff shall also submit a copy of the final version of the claim chart to the Court in WordPerfect format via email as a proposed order through the Court’s electronic filing system.

STATUS CONFERENCE: The Court shall hold a Status Conference on _____[to be set by the Court].

10. CLAIM CONSTRUCTION HEARING – The Court will conduct a claim interpretation hearing on [Parties to leave blank: Case Manager will schedule ~ 1-2 months from reply brief deadline].

STATUS CONFERENCE: The Court shall hold a Status Conference approximately 30 days after the *Markman* decision.

H. DEADLINE FOR AMENDING INFRINGEMENT, NON-INFRINGEMENT, AND INVALIDITY CONTENTIONS

Each party shall file seasonably amend any infringement, invalidity, or non-infringement contention in accordance with Rule 26(e) of the Federal Rules of Civil Procedure upon learning that the contention is incomplete or incorrect. Any amendment to a party's infringement, invalidity, or non-infringement contentions, or other pleading, that is necessary due to the Court's claim interpretation ruling, must be timely made but in no event later than one month after the Court's claim construction ruling.

I. EXPERT DISCOVERY

1. Each party shall serve expert reports as required by Rule 26(a)(2), on issues where that party bears the burden of proof, by [w/in 30 days of Markman decision]; on issues where a party does not bear the burden of proof, rebuttal expert reports are due by [w/in 1 month from principal expert report].

2. All expert discovery shall commence so as to be completed [w/in 1 month of the rebuttal expert reports].

J. MOTIONS

1. All dispositive motions shall be filed on or before [1-2 months after the deadline for expert discovery].
2. All motions in limine shall be filed on or before [Judge Cox's normal preference].

K. WITNESS LISTS AND EXHIBITS

1. The parties shall exchange preliminary witness lists on or before [Judge Cox's normal preference]; final witness lists shall be exchanged on or before [Judge Cox's normal preference].
2. The parties shall exchange preliminary exhibit lists on or before [Judge Cox's normal preference]; final exhibit lists shall be exchanged on or before [Judge Cox's normal preference].

L. PRETRIAL

1. The parties will file a Joint Final Pretrial Statement pursuant to Local Rule 16.2 on or before [Judge Cox's normal preference].
2. A Final Pretrial Conference will be held pursuant to Local Rule 16.1 on [Judge Cox's normal preference].

M. TRIAL

Trial will begin on [Parties to Propose a Date; Actual date to be set by Case Manager].

SO ORDERED

Dated: _____

The Honorable Sean F. Cox
United States District Court Judge

Attorney (Bar Number)
FIRM
ADDRESS
ADDRESS
TELEPHONE NUMBER

Attorneys for Plaintiff

Date: _____

Attorney (Bar Number)
FIRM
ADDRESS
ADDRESS
TELEPHONE NUMBER

Attorney for Defendant

Date: _____

EXHIBIT A

CLAIM INTERPRETATION CHART

Disputed Claim Term	Plaintiff's Proposed Construction	Defendant's Proposed Construction	Court's Construction
"Term 1"			
"Term 2"			
"Term 3"			
"Term 4"			